

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. V-11/09-593
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate risk of harm of a child. The issue is whether the Department has shown by a preponderance of evidence that the petitioner placed a child at risk of harm within the meaning of the pertinent statutes.

The decision is based on the evidence admitted at hearing.

FINDINGS OF FACT

1. The petitioner is the mother of two minor children. The incident in question involves her younger son who was two years old at the time.

2. The precipitating incident occurred on May 13, 2009. The Department substantiated a risk of harm by petitioner to her son.

3. On May 13, 2009, the petitioner went to the carwash to clean her car. Her son was with her.

4. The carwash is located off a major road. The carwash has five bays that are perpendicular to the road. On the side closest to the road, there are air hoses to clean the interior of cars. The bays vary in size. In the third bay, there are hooks to hang floor mats for washing. The bays face a local company. There is a low fence and a parking lot between the carwash and the local company.

5. M.C. and A.P. are employees of the local company. They are witnesses to all or part of the incident as set out below. Both were outside when they witnessed petitioner's actions. M.C. knows petitioner and M.C. realized that the woman she saw was petitioner.

6. A.P. was outside and first saw a woman vacuuming her car while a little boy ran around. A.P. could hear the woman swearing at the little boy. A.P. returned inside and came out later and saw the petitioner at a bay where the child was running around. A.P. saw the woman spray the child in the face with a water hose. The spray knocked the child down. When the child got up, the woman sprayed him in the back. The woman then picked up the child by the arm and spanked him. A.P. asked M.C. to come over and look.

A.P. could not identify the petitioner at hearing although the testimony of M.C. and petitioner establish that

petitioner is the woman A.P. saw although the petitioner disagrees about spraying her son with the water hose.

7. M.C. knows the petitioner. M.C. testified that she identified petitioner as the woman she observed on May 13, 2009. M.C. was called over by a co-worker on several occasions to look at what was happening. On the last occasion, M.C. said the petitioner had her back to M.C. and the child was facing petitioner. M.C. saw petitioner pick up the water hose, point the hose at the child and spray the child in the face. The child fell on his behind. The petitioner was swearing at the child. M.C. stated she was shocked and went into the office for help.

8. An employee of the local company telephoned the police. Both A.P. and M.C. expressed shock at what they witnessed. Their testimony is credible.

9. The petitioner testified that she went to the carwash at about 12:30 p.m. with her son. She vacuumed the car first. Petitioner's son was playing outside. Petitioner stated she yelled at her son in order to be heard over the vacuum. She went to the third bay and hung the car mats on hooks on the wall. Petitioner said her son was accidentally sprayed while she was spraying the mats. Petitioner admitted

that her son was not listening to her so she took him by the arm and swatted his behind. She admitted yelling at her son.

Petitioner stated she would not intentionally place her son at harm. Petitioner testified that she has seen a counselor and is working on her parenting skills.

ORDER

The Department's decision is affirmed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a child protection registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915 and 4916.

The Legislature amended the statute to include an administrative review process by which an individual can challenge his/her placement in the registry. 33 V.S.A. § 4916a. If the substantiation is upheld by the administrative review, the individual can request a fair hearing before the Human Services Board pursuant to 33 V.S.A. § 4916b and 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the child protection registry that an appeal is pending. 33 V.S.A. § 4916b(a).

"Abuse" and "risk of harm" are defined in 33 V.S.A. § 4912 as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

(4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

In "risk of harm" cases, the Board uses a gross negligence or reckless behavior standard to determine if an individual's actions meet the criteria for "other than by accidental means". The Board references the gross negligence standard used in Rivard v. Roy, 144 Vt. 32 (1963). In Fair Hearing Nos. 17,588 and B-06/08-293, the Board stated that the standard requires a showing that:

. . .the act (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

See also Fair Hearing Nos. Y-01/08-22 and B-08/08-384.

The petitioner testified that she did not intend to hurt her son. But, risk of harm cases include more than

intentional harm; these cases include reckless behavior or gross negligence.

Two witnesses saw petitioner aim the water hose and spray her son. They saw the child knocked to the ground by the force of the water. Both witnesses were shocked by what they observed. Through their employer, a call was placed to the police.

Petitioner appeared harried as she washed her car and saw to her two-year old son. Spraying the water hose at the child happened in the context of the child not minding petitioner, running around, and petitioner yelling at the child and spanking the child. When petitioner used the water hose to spray her child, petitioner showed an indifference to his care.

In this case, the Department has shown by a preponderance of the evidence that petitioner placed her child at risk of harm. The Department's decision to substantiate risk of harm is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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